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The centennial anniversary of the elevation of John Marshall to the ...

James Tyndale Mitchell, Philadelphia Bar Association, Lawyers' Club of Philadelphia, Pennsylvania Bar Association, University ...

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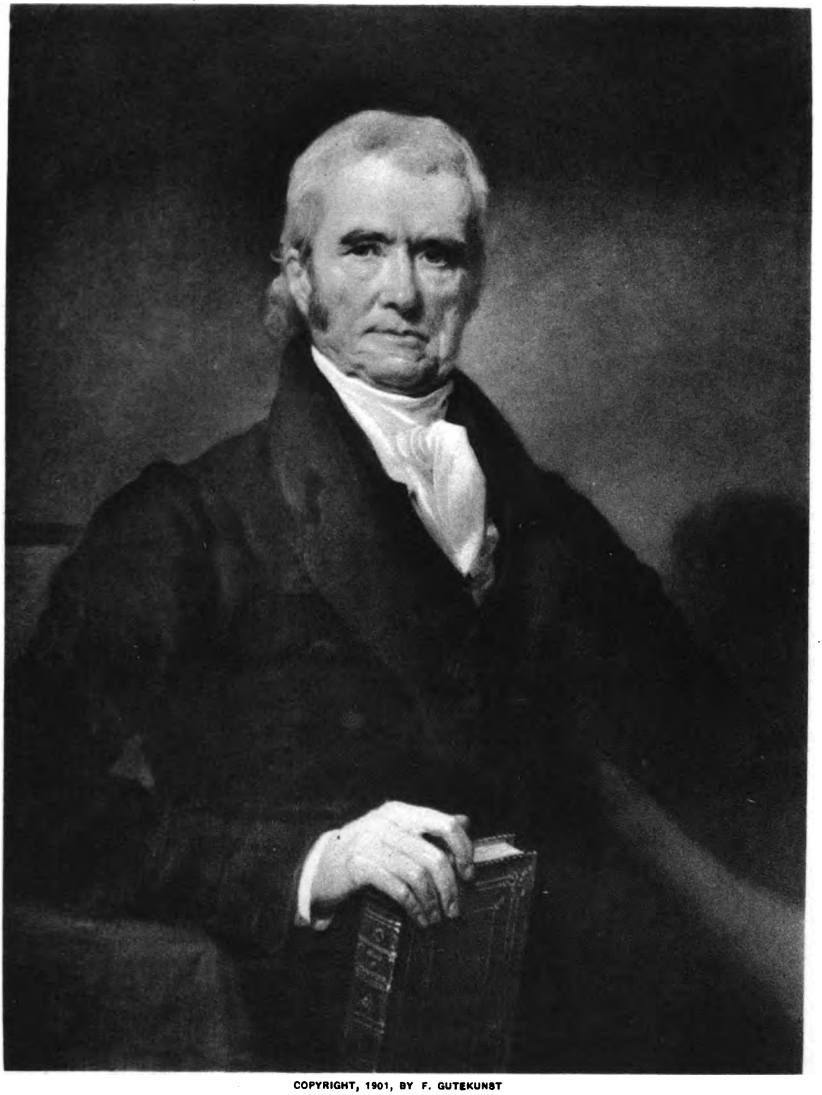

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The Centennial Anniversary

Of the elevation of

JOHN MARSHALL

To the office of

Chief Justice
Of the Supreme Court of the United States of America

Monday, February Fourth, 1901

Celebration in the City of Philadelphia

Under the auspices of

THE LAW ASSOCIATION OF PHILADELPHIA
THE LAWYERS' CLUB OF PHILADELPHIA
THE PENNSYLVANIA BAR ASSOCIATION
THE LAW SCHOOL OF THE UNIVERSITY OF PENNSYLVANIA

Philadelphia
Printed by George H Buchanan and Company
1901

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Rec. June 26, 1901.

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John Marshall Day

At a meeting of the Law Association of Philadelphia, held October 2, 1900, the following resolutions were adopted:

Resolved, That a committee of five be appointed by the Chancellor to provide for a suitable observance, on February 4, 1901, of the Centennial Anniversary of the elevation of John Marshall to the office of Chief Justice of the United States; and

Resolved, That the State Bar Association, the Lawyers' Club of Philadelphia and the other Bar Associations throughout the state and members of the Bar in general be invited to unite with this Association in carrying out the object of the above resolution.

The Chancellor appointed the following gentlemen members of that Committee:

JOHN CADWALADER, ESQ., *Chairman.*
HON. WM. W. WILTBANK,
GEORGE TUCKER BISPHAM, ESQ.,
WM. BROOKE RAWLE, ESQ.,
ALEXANDER SIMPSON, JR., ESQ.

Subsequently the Committee was increased to nine members, and Messrs. HENRY FLANDERS, WILLIAM H. STAAKE, EDWARD P. ALLINSON AND HAMPTON L. CARSON, were added to the Committee.

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In response to this resolution, the Lawyers' Club of Philadelphia appointed the following Committee:

HON. C. Y. AUDENRIED,
JOHN R. READ, ESQ.,
RICHARD C. DALE, ESQ.,
JOHN MARSHALL GEST, ESQ.,
JOSEPH DEF. JUNKIN, ESQ.

The Pennsylvania Bar Association:

HON. JOHN B. MCPHERSON,
VICTOR GUILLOU, ESQ.,
D. T. WATSON, ESQ.,
HON. W. U. HENSEL,
C. LA RUE MUNSON, ESQ.,
J. B. COLAHAN, JR., ESQ.

The Faculty of the Law School, University of Pennsylvania:

HON. GEORGE M. DALLAS,
PROF. WILLIAM DRAPER LEWIS,
PROF. JOHN W. PATTON,

as members of "a joint committee upon the suitable observance of the Centennial Anniversary of the elevation of John Marshall to the office of Chief Justice of the United States."

At a meeting of the Committee, held on the fifteenth day of October 1900, it was

Resolved, That the Chairman of the Committee be requested to confer with Mr. Justice Mitchell of the Supreme Court of Pennsylvania, and invite him to deliver an address upon the occasion.

At a meeting of the Committee held on the thirtieth day of October, 1900, after some informal discussion, on

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motion of Mr. Allinson, duly seconded, the chair was authorized to appoint a sub-committee consisting of two representatives from each organization represented on the joint committee, of which committee the Chairman should be a member *ex officio,* which should formulate a program or order of exercises for the day and report on the most advisable place of meeting, the sub-committee to report at the next meeting of the general committee. The Chair announced the following Committee:

HON. JOHN B. MCPHERSON, Chairman; with him MR. VICTOR GUILLOU, representing the Pennsylvania Bar Association; HON. W. W. WILTBANK and MR. WM. H. STAAKE, representing the Law Association; MR. JOS. DEF. JUNKIN and MR. JOHN R. READ, representing the Lawyers' Club.

This sub-committee organized by the election of Mr. William H. Staake, as Secretary. To this Committee on the eighth day of November, 1900, were referred all further details in connection with the celebration, with direction to report at a meeting of the General Committee, to be called on notification of the sub-committee.

At the same meeting the sub-committee recommended the following action, which was afterwards approved by the General Committee:

"That on Marshall Day, at 11 o'clock a. m., there be a meeting of the Bar in the room of the United States Circuit Court of Appeals, at which a formal minute should be presented to the Court, on behalf of the Bar, and your committee recommends that Samuel Dickson, Esq., Chancellor of the Law Association, an ex-President of the Pennsylvania Bar Association, and a member of the Board of Governors of the Lawyers' Club, be requested to draft and present this minute to the Court."

Colonels Wendell P. Bowman, Henry T. Dechert and Robert Ralston, Jr., were appointed as marshals of the procession of the Bench and Bar; the Presidents of the

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Three Law Classes of the University of Pennsylvania, were appointed marshals of their respective classes.

The following was the official form of invitation and the order of exercises:

The Law Association of Philadelphia,
The Lawyers' Club of Philadelphia,
The Pennsylvania Bar Association,
The Law School of the University of Pennsylvania,
request the honor of your presence
at the celebration of
"John Marshall" Day
in Philadelphia,
on Monday, February 4th, 1901.

ORDER OF EXERCISES

"JOHN MARSHALL" DAY

MONDAY, FEBRUARY 4, 1901.

A. M.—ELEVEN—Presentation of minute to the Judges of the United States Courts, in the Circuit Court of Appeals, United States Government Building, by Samuel Dickson, Esquire, Chancellor of the Law Association of Philadelphia, on behalf of the Bar.

To be responded to by one of the Judges of the United States Court.

ELEVEN-TWENTY—Procession of the Bench, Bar and Students at Law to Musical Fund Hall.

ELEVEN-THIRTY—Address in Musical Fund Hall by the Honorable James T. Mitchell, Justice of the Supreme Court of the Commonwealth of Pennsylvania.

MUSIC BY HASSLER'S ORCHESTRA

All of the Courts of the United States; the Supreme Court of Pennsylvania, and Courts of the County of Philadelphia, in response to the request of the General Committee, adjourned on Monday, February 4, 1901, John Marshall Day, with the exception of the United States Cir-

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cuit Court of Appeals, which held a special session, to receive the Minute presented to the Court on behalf of the Bar. This Minute was prepared by Samuel Dickson, Esq., the Chancellor of the Law Association, and was presented in the unavoidable absence of Mr. Dickson, on account of sickness, by Richard C. Dale, Esq., of the Philadelphia Bar.

The following official notice of formation and order of procession was issued by the marshals:

"JOHN MARSHALL" DAY
Formation and Order of Procession

"For the convenience of the members of the Bar attending the ceremonies on "John Marshall" Day, February 4, it is requested by the Committee that the following formation and order of procession be observed:

"The formation will take place at 11 o'clock, and the procession will move on the completion of the ceremonies in the United States Court of Appeals.

"The First Division will form in the north corridor of the third floor of the Post Office Building; the Second Division will form in the east corridor of the same floor; the Third Division will form in the east and south corridors of the same floor; the Fourth Division will form on the north side of Chestnut Street west of Ninth Street. The points of formation will be indicated by placards.

"The First Division will be composed of the judiciary, the committees and their guests, and members of the Bar admitted prior to 1860. Marshal, Wendell P. Bowman.

"The Second Division will be composed of members of the Bar admitted from 1860 to 1880. Marshal, Henry T. Dechert.

"The Third Division will be composed of members of the Bar admitted since 1880. Marshal, Robert Ralston.

"The Fourth Division will be composed of the members of the Law Academy of Philadelphia, the under-graduates

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of the Law School of the University of Pennsylvania, the under-graduates of the Philadelphia Law School of Temple College, and other students-at-law. Marshal, John McClintock, Jr."

The expenses of the celebration, of the publication of the proceedings and of placing a suitable memorial tablet in the room of the United States Circuit Court of Appeals, were borne by a voluntary subscription of the members of the Bar of the City of Philadelphia.

A meeting of the General Committee was held on the eighteenth day of February, 1901, at which it was formally resolved, that the residue of the moneys subscribed and such other funds as may be received, should be used in procuring a tablet to be placed in the room of the United States Circuit Court of Appeals, and if the funds of the Committee should be sufficient, a tablet should also be placed on the house No. 426 Walnut Street (the old Crimm Boarding House) where Chief Justice Marshall died in 1835.

It was further resolved, that the selection of the two tablets, and the publication of the proceedings of the celebration, should be referred to a special committee as follows:

HENRY FLANDERS, ESQ.,
HON. GEORGE M. DALLAS,
SAMUEL DICKSON, ESQ.,
VICTOR GUILLOU, ESQ.,
JOSEPH DEF. JUNKIN, ESQ.,

together with John Cadwalader, Esq., the Chairman and William H. Staake, Esq., the Secretary of the General Committee. This Committee organized on the twenty-fifth day of February, 1901, by the selection of Henry Flanders, Esq., as Chairman and William H. Staake, Esq., as Secretary. Messrs. Dickson, Guillou and Junkin, were appointed a sub-committee to propose and report the literary compo-

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sition of the inscription to be placed upon the tablet in the Court room.

Messrs. Cadwalader, Junkin and Guillou, a sub-committee to propose and report upon the physical composition and form of the tablet and the contract for its erection.

Messrs. Cadwalader, Dallas and Staake, a sub-committee to confer with the Judges of the United States Circuit Court of Appeals, as to an appropriate site for the tablet.

By resolution of the Committee the following will be the inscription upon the tablet:

Upon February 4th, 1901
being the One Hundredth Anniversary of the day upon which

JOHN MARSHALL

took his seat as Chief Justice of the Supreme Court of the United States
the Chancellor of the Law Association of Philadelphia
on behalf of

THE LAW ASSOCIATION OF PHILADELPHIA
THE LAWYERS' CLUB OF PHILADELPHIA
THE PENNSYLVANIA BAR ASSOCIATION
THE DEPARTMENT OF LAW OF THE UNIVERSITY OF PENNSYLVANIA

acting for the members of the Bar of the
Supreme Court and other Courts of Pennsylvania,
moved the United States Circuit Court of Appeals
for the Third Circuit
then specially convened
to enter upon its records a Minute
expressing their appreciation of his character and work

And it was thereupon
SO ORDERED.

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THE MEETING IN THE UNITED STATES CIRCUIT COURT OF APPEALS, MONDAY, FEBRUARY 4, 1901, AT 11 A. M.

The Honorable George M. Dallas, the Senior Judge, presided. Sitting with him were the Honorable George Gray, Honorable William Butler, Honorable John B. McPherson and Honorable Andrew Kirkpatrick. The orator of the day, Honorable James T. Mitchell, LL.D., was also present upon the bench.

THE COURT BEING FORMALLY OPENED

Mr. Richard C. Dale, of the Philadelphia Bar, in the absence of Mr. Samuel Dickson, the Chancellor of the Law Association of Philadelphia, then addressed the Court, as follows:

May it please your Honors:

At the approach of the one hundredth anniversary of the day on which John Marshall took his seat upon the Bench of the Supreme Court of the United States, there grew up a feeling throughout the country that the day should be marked by appropriate exercises, in which the services of the great Chief Justice might be recalled and some expression given to the affectionate veneration in which his memory is held by the Bench and Bar of the United States. For reasons which will at once suggest themselves to your Honors, it was recognized that, irrespective of what might be done elsewhere, it was essential that the day should be properly observed in this city, and the Law Association of Philadelphia accordingly appointed a Committee, and requested the appointment of similar committees by the Pennsylvania Bar Association and the Lawyers' Club of Philadelphia, that they might unite in making the necessary arrangements for the occasion. A joint

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Committee was then made up from representatives of the three organizations to take charge of the proceedings, and, by way of introduction to the exercises of the day, the Committee appointed the Chancellor of the Law Association to prepare and present a Minute to your Honors, to be entered upon the records of the Court; and with your Honors' permission, I will now read the Minute prepared in pursuance of such appointment.

AND NOW, February 4, 1901, the Law Association of Philadelphia, the Pennsylvania Bar Association, the Lawyers' Club of Philadelphia, and the Law Department of the University of Pennsylvania, acting on behalf of the Bar of Pennsylvania, move that the following Minute be entered upon the records of this Court:

It is the hereditary privilege of the members of this Bar to express, upon every proper occasion, their veneration for the character of Chief Justice Marshall and their appreciation of his judicial work. He had been personally well known to the lawyers of this City while serving as a member of the House of Representatives in the session of 1799–1800, and when again here in 1831, he was requested by the Bar of Philadelphia to give sittings to Henry Inman, who painted the portrait which has passed into the custody of the Law Association and is the one authentic record of the form and features of the original. It was in pursuance, also, of the action taken at a meeting of this Bar, upon the announcement of his death, that the sculptor, Story, the son of his old colleague and friend, was engaged to model the statue now placed at the foot of Capitol Hill; but better than the likeness of the outer man by painter or sculptor, is the masterly delineation of his mind and life in the Memorial Addresses delivered by Horace Binney and William Henry Rawle, and in the biographies by members of the Bar of this City, still living. Thus by the canvas of the painter and the bronze of the sculptor, and by words more lasting than either, this Bar has been diligent to

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preserve the memory of what manner of man the Chief Justice was in person and in achievement.

To the estimate made up by men so competent to measure his worth and to pass judgment upon his work, nothing can profitably be added; and in his case contemporary opinion is exceptionally trustworthy. He was so simple and unassuming, so free from self-seeking or from any thought of self—so clear in his great office—and of such transparent simplicity and sincerity of character, that it has always been manifest that he was at heart just what he seemed to be, and it would never occur to any eulogist to claim, as a merit, that no record could ever leap to light to shame his memory. Nor is it possible, perhaps, to appreciate his opinions at this day as fully as at the time of their delivery. They are now familiar to every lawyer, and are become an integral part of the great body of law, which is learned by the student as established and accepted doctrine; but the lawyers who declared, in the address presented upon the occasion of his visit in 1831, that they could not but

> "consider the whole nation indebted to one who for so long a series of years has illuminated its jurisprudence and enforced with equal mildness and firmness its constitutional authority; *who has never sought to enlarge the judicial power beyond its proper bounds, nor feared to carry it to the full extent that duty required*,"

belonged to a period when the questions with which he had been called upon to deal and decide were still unsettled, and when the law libraries of the day were barren of authority, so that they could understand the full force of Mr. Justice STORY'S saying that "these exquisite judgments were the fruits of his own unassisted meditations."

It is true, however, that time now enables us to understand, as they could not, how broad and deep and abiding was the impress which the Chief Justice was making upon the institutions and jurisprudence of the country. It is now apparent that the Federal Judiciary

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took shape and earned its commanding place in the life of the nation through his labors. He began by proving that the Government of the United States deserved, as he himself expressed it, "the high appellatior of a government of laws and not of men." The course of reasoning by which he demonstrated that all the departments of the Government were defined and limited by the Constitution, and that an Act of Congress, contrary to the Constitution was not law, and that the Courts as well as other departments were bound by that instrument, compelled assent. The Constitution was thus made in fact the supreme law of the land and the test by which the Court might be required, by any suitor, to measure the validity of any other law and the legality of any executive act. What followed was the development and illustration of this seminal principle, and in working out the problems as they subsequently arose, he laid down canons for the construction of the Constitution of the United States which are accepted as final authority, not only in determining the true meaning of the Constitution of the United States, but of the Constitution of every State in the Union; and while his judgments fixed the relations of the Federal and State Governments and of the States as between themselves; of the Executive and the Legislature to the Judiciary, and to one another, and defined the immunities and duties of foreign sovereigns—they did a work no less important in making effectual the safeguards of personal rights and of private contracts, of the freedom of interstate commerce and of the navigable waters of the United States.

When his work is thus surveyed as a whole, it is manifest that this plain, simple man, who eschewed all ceremony and whose pleasure it was to live undistinguished from his fellow-citizens; who wore none of the insignia and wielded none of the resources of worldly rank or power, was exercising an influence—decisive then, and accumulating and reduplicating ever since—greater than that of any statesman or soldier at home or abroad. The monarchs of Europe, who were his

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contemporaries, are scarcely remembered by name, with the exception of one, who gave his name to a code, compiled by others, and the Code Napoleon is the only memorial left of the imperial sway which dominated the Continent. But the work of Marshall lives to-day and is more potent than ever. It constitutes an integral part of the body of law which enters into the daily life of every citizen, which maintains the autonomy of the States and the integrity of the Union, and by which the civilized nations of the world regulate their intercourse; and what is possibly of greater importance, the ready acceptance by the people of the United States of the decisions of their Supreme Court, in loyal submission to the supremacy of the law, is largely due to the impression made upon the country by his character and career as a man and as a judge.

To the tribunal which secured under him as its presiding magistrate, the confidence of a nation of freemen, sovereign states gladly submit their strifes, and the destiny of millions of an alien race now awaits its decision. When the greatest of English Chancellors was about to determine the rights and boundaries of "two great Provincial governments"—as he styled the colonies of Maryland and Pennsylvania—he said that "the cause was of a nature worthy the judicature of a Roman Senate rather than a single judge, and his consolation was that if he should err in his judgment, there was a judicature equal in dignity to a Roman Senate that would correct it." The colonies of which he was to draw the boundary line were then comparatively uninhabited, but now equal or excel in numbers and wealth the Kingdom of Great Britain at the time when Lord Hardwicke took his seat upon the woolsack; and the Supreme Court would proceed to decide to-day a question of boundaries or any other controversy between them as if it were a question between private litigants. Compared to such an arbitrament as an instrument for ascertaining and declaring the very right of a dispute, armies and navies are but the surviving agencies of a lower civilization; and if the future is to attain to the ideal

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of a "Parliament of man and a Federation of the world," it will find the exemplar of its ultimate judicature in the Court which John Marshall made a living reality.

It is, therefore, with heartfelt gratitude that we assemble on this anniversary to make, once more, formal and public acknowledgment of the obligation of our country and our profession to the wise and upright Judge, who, one hundred years ago, assumed the duties of Chief Justice of the Supreme Court of the United States.

The Minute having been presented, the Honorable George M. Dallas replied as follows:

Gentlemen of the Bar:

The constrained absence of Mr. Justice Shiras and of Judge Acheson, which we all regret, is especially deplored by that member of the court to whom, in consequence, the honor of speaking on its behalf has most inauspiciously descended. We regret, too, that Judge Buffington and Judge Bradford have been prevented from attesting by their presence the sympathetic interest which we have been assured they feel in the memorable proceedings of to-day.

This court has been convened solely for the purpose of enabling us to unite with you, and with our brethren of the Pennsylvania courts, in rendering tribute to the memory of one whose title to the homage of the noble profession to which we all belong time has but strengthened and confirmed. The value of John Marshall's services to his country's jurisprudence can, even at this day, scarcely be appreciated, and we will make no attempt to estimate it. His meed of praise could not be reckoned in hurried words, and the teeming field of befitting eulogy has been so happily allotted as to warn us that any encroachment there would be a trespass without pretext of occasion or color of excuse. There is, however, abundant precedent for borrowing from Marshall himself the best expression of the eligible thought, and this, at least, may now be done, and yet no bounds be

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broken; for it seems to be peculiarly appropriate that in this place, where justice is judicially administered, there should be applied to our most perfect pattern of judicial excellence, the singularly apposite encomium with which he closed his Life of Washington. We need do no more than recall it to remembrance: its pertinence is plain.

"Endowed by nature with a sound judgment, and an accurate discriminating mind, he feared not that laborious attention which made him perfectly master of those subjects, in all their relations, on which he was to decide; and this essential quality was guided by an unvarying sense of moral right, which would tolerate the employment, only, of those means that would bear the most rigid examination; by a fairness of intention which neither sought nor required disguise; and by a purity of virtue which was not only untainted, but unsuspected."

Gentlemen, the felicitous memorial which you have caused to be so suitably presented, is unanimously concurred in by the court, and will be transcribed at length upon its minutes.

The proceedings in the United States Circuit Court of Appeals being closed, the Court adjourned.

The Court room notwithstanding the inclemency of the weather was crowded with members of the Bench and Bar, to its full capacity.

THE PROCESSION OF THE BENCH AND BAR

Following the adjournment of the Court, the members of the Judiciary of the United States Courts, of the Supreme and Superior Courts of the Commonwealth of Pennsylvania, of the Courts of counties outside of Philadelphia, and of the Courts of Common Pleas and the Orphans' Court of the County of Philadelphia, together with visiting members of the bar, the members of the bar of the County of Philadelphia, and the students of the Law School of the University of Pennsylvania, the members of the Law Academy of Philadelphia, the students of the Philadelphia Law School of Temple College and the unorganized body of students at law, properly marshaled, formed in procession in the following order:

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The First Division composed of the judiciary, the committees and their guests, and members of the Bar admitted prior to 1860. Marshal, Wendell P. Bowman.

The Second Division composed of members of the Bar admitted from 1860 to 1880. Marshal, Henry T. Dechert.

The Third Division composed of members of the Bar admitted since 1880. Marshal, Robert Ralston.

The Fourth Division composed of the members of the Law Academy of Philadelphia, the under-graduates of the Law School of the University of Pennsylvania, the under-graduates of the Philadelphia Law School of Temple College, and other students-at-law. Marshal, John McClintock, Jr.

The line of march was from the United States Government Building at Ninth and Chestnut Streets, along the south side of Chestnut Street to Independence Hall, through the main hallway, passing the old Liberty Bell—which was cracked in tolling for the funeral of Chief Justice Marshall—into Independence Square, through the square in sight of the house in which Chief Justice Marshall died, across Sixth Street, into and across Washington Square to Locust Street, and along Locust Street to Musical Fund Hall, where the principal celebration took place.

The order of exercises at the Hall was as follows:

Music by HASSLER'S ORCHESTRA.

Prof. Mark Hassler, *Conductor*.

Meeting called to order by Hon. GEORGE M. DALLAS, *Chairman*.
Prayer by Right Reverend O. W. WHITAKER, D.D., Bishop of the Diocese of Philadelphia.

Music.

Introductory Address, Hon. GEORGE M. DALLAS.
Address, "JOHN MARSHALL," Hon. JAMES T. MITCHELL, LL.D.

Music.

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PROCEEDINGS IN MUSICAL FUND HALL

The meeting in Musical Fund Hall was presided over by the Honorable George M. Dallas, of the United States Circuit Court, who in calling the meeting to order said:

Ladies and Gentlemen:

The high dignity of presiding in this notable assemblage having devolved upon me, I now call the meeting to order. The Right Reverend O. W. Whitaker will open its proceedings with prayer.

PRAYER

by the

RIGHT REVEREND O. W. WHITAKER, D.D.

O Lord, our Heavenly Father, Almighty and everlasting God, Who has safely brought us to this day; defend us in the same with Thy mighty power; and grant that this day we fall into no sin, neither run into any kind of danger; but that all our doings being ordered by Thy governance, may be righteous in Thy sight, through Jesus Christ our Lord.

Amen.

We thank Thee, O God, for the land in which we live: for our civil, religious, educational, and social privileges, and for all the blessings which we enjoy.

We thank Thee that Thou hast blessed the United States and this Commonwealth with an able and honest judiciary.

We thank Thee for all the great and good men whom Thou hast raised up to be leaders in our nation's history. We thank Thee for George Washington, and especially do we thank Thee at this time for John Marshall, whom Thou didst call one hundred years ago to be the Chief Justice of the United States, and in whose memory we are here assembled.

We thank Thee for his great ability, his incorruptible integrity, his reverence for truth, his devotion to duty, his love for righteousness.

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We thank Thee for his interpretation of the Constitution; for his clear perception of the respective functions of the Departments of our Government, for the standing and character which he gave to the Supreme Court.

We thank Thee for his pure domestic life; for his modesty and courtesy; for his recognition of merit whether in an opponent or an associate; for his unwavering faith in Jesus Christ as the Redeemer and Saviour of men.

May we draw inspiration from the contemplation of his character and life, and be led to follow his example in manly and righteous living, in fearless advocacy of the truth wherever it may lead.

O Almighty Lord, Who fashionest the hearts of men and considerest all their works: Grant, we beseech Thee, to us and all the people of this land, the spirit of obedience to Thy commandments; that, walking humbly in Thy fear, under Thy mighty protection, we may dwell in righteousness and peace. Defend our liberties; preserve our unity; save us from lawlessness, dishonesty and violence; from discord and confusion; from pride and arrogance, and from every evil way. Continue Thy goodness to us, that the heritage received from our fathers may be preserved in our time and transmitted, unimpaired, to the generations to come; that all nations of the earth may know that Thou, O Lord, art our Saviour and mighty Deliverer and our King forever. Grant this, we beseech Thee, through Jesus Christ our Lord, Who has taught us when we pray to say:

Our Father, Who art in heaven, hallowed be Thy Name, Thy kingdom come, Thy will be done on earth as it is in heaven. Give us this day our daily bread, and forgive us our trespasses, as we forgive those who trespass against us. And lead us not into temptation, but deliver us from evil, for Thine is the kingdom, and the power, and the glory, forever and ever.

Amen.

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INTRODUCTION

of the

HONORABLE JAMES T. MITCHELL

(the Orator of the Day)

by the

HON. GEORGE M. DALLAS

We have come together, ladies and gentlemen, to commemorate the accession to the office of Chief Justice of these United States of the foremost in the line of illustrious lawyers who have adorned that exalted station, and to acclaim our grateful sense of the inestimable benefits which, after the lapse of one hundred years, our country still derives from that event. For this opportunity to evince the veneration with which as citizen, soldier, statesman and jurist, we bear John Marshall in remembrance, we are indebted to the Law Association of Philadelphia, the Lawyers' Club of Philadelphia, the Pennsylvania Bar Association, and the Law School of the University of Pennsylvania. The members of the joint committee of these several bodies have discharged all the duties confided to them with ardent zeal, and now—despite the inclemency of the weather—assured success; but, above all, they are to be congratulated upon having most aptly selected, and most fortunately secured, as the orator of the day, a distinguished member of the highest judicial tribunal of this Commonwealth, at whose feasts of reason, good digestion always waits on appetite. I know it will be as gratifying to you to receive as it is to the chair to present the Honorable James T. Mitchell.

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MR. JUSTICE MITCHELL:

Brethren of the Bench and the Bar
Ladies and Gentlemen:

To the dweller on the plain, the neighboring hills which shut out the distant horizon, seem to be the summits of the earth. But the traveler as he journeys onward, finds the encircling heights gradually sinking to the general level of his enlarged and widening view, till the perspective brings all things to their true proportions.

In the estimate of men and of events the perspective of time is no less potential and no less necessary than the perspective of distance in the estimation of things visible. The popular idols of to-day are forgotten of the morrow, while the silent and unnoticed great come forward to their true place. It is the habit of our minds to measure by periods. The new year suggests the retrospect of its predecessor with respect to ourselves and our daily lives, and so the new century naturally turns our thoughts to the wider field of history and our country in the century that has closed. The small prominences of ephemeral measures and men have come down to the common level, but when through the long vista of a hundred receding years one lofty figure has steadily risen above even the height at which its cotemporaries placed it, then indeed we have the last and indisputable proof of its true eminence.

We have lived in an age of centennial commemorations. Twenty-five years ago, here in its birthplace, the Republic celebrated the first century of its existence, and revealed to itself as well as to the half incredulous world the unparalleled progress of the thirteen weak and scattered colonies to a place in the front rank of the nations of the earth. Since then we have had other centennials with appropriate celebrations, but none more notable than that which brings us together to-day. We are here to celebrate one of the greatest of the heroes of peace, to pay our willing and affectionate tribute of appre-

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ciation, of gratitude and of reverence to great public services, exalted personal character, and clear pre-eminence in the least showy and least obtrusive path of all the fields of intellectual effort. There is no criterion of any man's worth and work so sure as professional approval, and in no profession is judgment more unerring than in the lawyer's final estimate of the judge. For the judge must do his daily work in the open, before a trained and sharply observant audience of critics learned in the subjects on which he is called to act, more minutely informed on each case than he can be, and viewing it with the stereoscopic result of eyes sharpened by individual interests at a different and conflicting angle. When, therefore, at the end of a century we find his countrymen, led by the legal profession, turning spontaneously to a fitting commemoration of the day that John Marshall took his seat as Chief Justice of the Supreme Court of the United States, we have a tribute not due to the glamour of temporary popularity, but to the cool and deliberate judgment of men who know. The honor of the first public suggestion belongs, I believe, to the Bar of Illinois. On a bronze tablet in one of the busiest streets of the second city in the Union you may read the date 1812 and recall from the accompanying inscription that eleven years after he took his seat as Chief Justice all that Marshall knew of the site of Chicago was the dread news that came from the depths of the Western wilderness that the Indians had massacred the little garrison of Fort Dearborn. History affords no more striking note of the changes a century may produce than that the site of that gallant little out-post, now the home of a larger population than that of the three largest states in 1801, first summons the Bar of the country to the commemoration of the greatness of the Chief Justice whose work was done for a young and experimental government, but was laid down on such broad and sure and permanent lines that expanding territory and teeming populations have not lessened its usefulness, nor in the least impaired its vigor.

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The suggestion once made struck a responsive chord over the whole land, and to-day his fellow citizens, his brethren in the profession, are gathered in every centre of legal activity to bear witness that the lofty figure who was placed at the head of the judiciary a hundred years ago has continued to grow in height and eminence with the increasing years.

John Marshall was born September 24, 1755, at a small place called Germantown, now Midland, within the sunset shadow of the Blue Ridge in the valley of Fauquier County, Virginia. His ancestor who had been a royalist cavalry officer in the service of King Charles, came to Virginia and settled in the famous county of Westmoreland, the birth place of Washington, of Monroe, of Richard Henry Lee and his famous brothers. There his descendant, Thomas, father of the Chief Justice, was born in the same year with Washington, was schoolmate with him in the scanty school days of their youth, acted with him as assistant in making surveys for the great landed proprietor of that day, Lord Fairfax, and served under him as Colonel of the Third Virginia Line at Brandywine, at Valley Forge and at Trenton.

In the history of that time few things are more notable than the precocity of the men. The situation called for early development. Men were scarce and work of every kind was all around them waiting for their hands. Energy and activity were in the air they breathed, and the impatience of the youthful spirit to assume the rights and duties of manhood, was stimulated by the surrounding opportunities at an age which in an older community would have found them contented to be school boys. The surveys, the field notes and the maps made by Washington at the age of sixteen, some of which you may see to-day in the collections of the Historical Society of Pennsylvania, attest the maturity as well as the activity of mind and body which resulted in the Virginia Colonel at twenty-three taking practical command and cover-

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ing the retreat of the British regulars on the banks of the Monongahela. And the youthful Washington was but *primus inter pares,* with his associates.

Thomas Marshall moved to Fauquier County, married Mary Isham Keith, the daughter of an Episcopal minister, and they had fifteen children of whom John was the oldest. Fauquier was a frontier county, sparsely settled, and the opportunities of education of the future Chief Justice were limited. At the age of fourteen he was sent to Westmoreland to the school of the Rev. Archibald Campbell, where he had James Monroe for a fellow student. After a year there he returned home and received further instruction in the classics from the Rev. James Thomson, for another year. This ended his regular education, but his father, though of limited early opportunities, was a diligent reader, and not only instructed his son in mathematics, but guided his taste in reading the best English authors both in prose and poetry. Judge Story relates how the Chief Justice was accustomed to say with affectionate emphasis, "My father was a far abler man than any of his sons. To him I owe the solid foundation of all my own success in life." It is recorded of the Chief Justice that at twelve years of age he had copied the whole of Pope's Essay on Man, and that his early taste was for poetry, of which he not only read but wrote a great deal. Prof. Theophilus Parsons in some Reminiscences of Marshall says that he early showed the sagacity which always distinguished him, for though he wrote a good many verses he never published any of them. The genius of the Chief Justice was certainly not poetic, yet I have no doubt it found nourishment as well as recreation in his early reading in that field, and the pure and classic English of his writings may be justly attributed in part at least to a taste fashioned on those incomparable models. Both in matter and in manner it must be admitted that Pope's Essay on Man is very solid food for a boy of twelve.

A little later his attention was given to the more serious

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study of military matters. He was born, as we have seen, in the year of Braddock's defeat, the French and Indian war was almost within his recollection and must have been the topic of frequent discussion in all his boyhood, and as he grew towards manhood the disputes of the colonies with the mother country and the prophetic feeling of the approaching collision, turned his mind in that direction. When the news came that blood had been shed at Lexington he was already lieutenant of a militia company of which his father had been captain and during the same summer he was appointed lieutenant in a Battalion of Minute Men, and saw his first service in the encounter at Great Bridge near Norfolk with the Loyalists under Lord Dunmore. In July, 1776, he was made lieutenant in the Eleventh Virginia Regiment of the Continental Line, became captain in May, 1777, and remained in active service till 1779, having been present at the battles of Brandywine, Germantown, and Monmouth, the assault at Stony Point and at Paulus Hook, as well as through the memorable winter at Valley Forge. In 1779 the number of officers in the Virginia line being found excessive he was ordered to return to Virginia to await the raising of fresh levies, but these being delayed, he resigned. He re-entered the army, however, in October, 1780, on the invasion of Virginia by the British under Arnold, and served through that campaign.

On this occasion when we are met to commemorate his entrance on judicial office, I must necessarily touch thus briefly his military career, but it would be a mistake to pass it lightly by as a mere incident of his youth, and doubly so to overlook its effect upon him. It colored his whole future life and opinions. Though his rank was not high he appears to have impressed himself upon his fellow officers not only as a brave and patriotic soldier, but also as a man of clear and impartial mind, with a judgment mature beyond his years. He was often called upon to act as arbiter of private disputes and officially as judge advocate, and earned the

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affection as well as the respect of officers and men. A fellow officer (Lieutenant Philip Slaughter) who left a record of his experiences, wrote of him, "Marshall was the best tempered man I ever knew. During our sufferings at Valley Forge nothing discouraged, nothing disturbed him. If he had only bread to eat, it was just as well; if only meat it made no difference. If any of the officers murmured at their deprivations he would shame them by good natured raillery, or encourage them by his own exuberance of spirits." But the effect of his military experience on the man himself was even more notable. It broadened his ideas, his opinions, his feelings, and fixed indelibly his ardent patriotism. He entered the army a Virginian, he left it an American. He has himself written, "I found myself associated with brave men from different states who were risking life and everything valuable in a common cause believed by all to be most precious, and I was in the habit of considering America as my country, and Congress as my government."

In 1779, as already said, he returned to Virginia, and reported at Williamsburg where the legislature was then sitting. While waiting for the fresh forces to be raised, he commenced his professional studies with a course of lectures on law by the famous Chancellor Wythe of William and Mary College, also attending a course on Natural Philosophy by the learned and accomplished Madison, afterwards Bishop of Virginia. With the short interruption of the campaign of 1780, he continued his studies at Williamsburg, was admitted to the bar in 1781 and returned to his native county of Fauquier.

He rose rapidly into practice and a position of note. He was himself fond of attributing this to the partiality of his former friends and companions in arms, and perhaps with some justice, for he knew their sufferings, their necessities, and their wrongs, and he lacked neither courage nor ability to espouse their cause. But we know there were more potent

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reasons than this for his success. How many of my younger hearers to-day have any adequate realization of the hardships and miseries of that time, of the poverty and distress of the people, the exhaustion and helplessness of the government? The war practically ended with the surrender of Cornwallis at Yorktown, in October, 1781, and officers and men began to return to their homes. But peace was not yet, and until peace nothing was settled or secure. A cessation of hostilities in Europe, or a resolute War Minister in England might at any time see the renewal of the effort to subdue the colonies and all the patriots' exertions and sacrifices must begin again or their cause be finally lost. The men who returned home at the end of their enlistment returned to houses falling into decay, to fences gone, and unploughed fields grown rank with weeds, with herds scattered or perished, and desolation and ruin impending on every hand. The Marshall family were well to do among their neighbors, yet a great-granddaughter has told (8 Green Bag, 480) how when John came from the army to Fauquier to see his parents, bringing with him some French officers, his companions, his mother made into bread a little wheat flour, the last she had which had been saved for some such hospitable occasion, and the young children cried for some of the unwonted dainty, so that John first learned of the straits to which his family were reduced. It is added that with characteristic self denial he avoided eating any of the bread so that the younger children might have some. Every biography of every officer of the time bears witness to the same condition of things, scant food, no supplies, no money. The commissioned officers of the Quartermaster's Department, under so capable and so energetic a Quartermaster General as Nathanael Greene memorialized Congress that a year's salary in the depreciated currency was scarcely sufficient to buy a suit of clothes, and even that salary was unpaid.

This was the state of affairs when Marshall came to the bar. Virginia was an agricultural state, and the wealth of

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the people was in their land. The land was in the condition I have already alluded to, and the troubles that arose from neglected and deserted homesteads or encroaching neighbors went inevitably into litigation. Fauquier, moreover was a frontier county, and "land cases" from overlapping surveys, conflicting boundary lines, dubious titles and the like, filled the dockets of the courts. To such business Marshall brought special adaptation from his knowledge of the country and the people, his practical familiarity with the questions, his clear and penetrating mind, his untiring industry and the confidence inspired everywhere by his personal character. It was inevitable that he should come rapidly to the front of the bar.

In 1782, at the age of twenty-seven, he was elected by his neighbors in Fauquier to the legislature, and soon after moved to Richmond. The bar there was one of the most distinguished in the country. It was led by Patrick Henry and Edmund Randolph, and included John Wickham, James Innes, Alexander Campbell and Benjamin Botts, names which have still a national celebrity. Among these Marshall took and held an honorable position, and his practice and reputation continued to increase steadily, notwithstanding the interruptions of his public legislative duties.

He had come now to what we may call the second period of his career, to practical acquaintance with politics and legislation. The problems that confronted him were those which have most keenly tried the knowledge, the wisdom, and the courage of statesmen in all ages and in every country—how, without making their burdens unbearable, to procure from a land and a people prostrated and exhausted by years of war, the means of meeting the public obligations, of preserving the public credit, and the maintenance of the government. When the sword is drawn in defence of home and liberty, men stop not to count the cost. Moreover in a brave and energetic people there is always a large and influential party

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with whom war is for its own sake unfortunately popular. The *gaudium certaminis* itself supplies incentive and men are apt to throw away even the little effort to look beyond the moment. But when the fight is ended, and the exhausted combatant returns to a wasted homestead and the daily pressure of poverty on his household, then indeed comes the need of a resolute facing of the cost and the consequences. This was the situation, and these the serious problems that engaged Marshall's attention from his entrance into political life. I may not stop to dwell on particulars, for I must pass on to even larger questions that were approaching. Suffice it here to say that with two short intermissions caused by his voluntary refusal of re-election, he continued in the legislature for ten years with constantly increasing reputation, and during part of that time was also member of the Privy Council of the State, elected by the legislature under the Constitution of 1776, to "assist in the administration of government," a sort of independent cabinet to advise and in some degree control the executive.

The years following the close of the Revolution were full of political doubt and danger and confusion. The condition I have mentioned in Virginia prevailed in all the states. The common peril from the common enemy no longer held them unquestioningly together, and under the pressure of their domestic difficulties they were becoming impatient of even the slight interference of the central government. Congress under the Articles of Confederation had no power of compulsion on the states or their citizens. It could not levy taxes, or enforce obedience to its laws. It represented merely a league, not a government and its feebleness is thus forcibly summed up by Judge Story. "Congress could make contracts, but could not provide means to discharge them. They could pledge the public faith, but they could not redeem it. They could make public treaties, but every state in the Union might disregard them with impunity. They could

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enter into alliances, but they could not command men or money to give them vigor. They could declare war, but they could not raise troops, and their only resort was to requisitions on the states. In short all the powers given by the Confederation, which did not execute themselves without external aid were at the mere mercy of the states, and might be trampled upon at pleasure." The pressure of these evils produced the Convention which framed the Constitution of the United States, and then came the momentous question of its ratification by the states. It is difficult for us with our experience of its benefits to appreciate the depth and fervor of opposition to it. Yet in all the states there was a party who saw in it the portentous shadow of imperialism, which would ultimately crush and obliterate the states and build on their ruins a central despotism. Nor was the party small in numbers nor insignificant in abilities or patriotism. No man may question the patriotism of Patrick Henry, yet in the Virginia Convention he devoted his fiery eloquence to the opposition and he was ably supported by George Mason, who had been a member of the convention that framed the Constitution, had had great influence in molding its final form, and yet had been so dissatisfied with it that he refused to sign it. On the other side was Edmund Randolph who like Mason was one of the members who refused to sign the Constitution, but who though dissatisfied had become convinced that it was preferable to the evils and dangers under the Confederation. With him was James Madison, a resolute supporter from the first of the Constitution which he too had helped to frame and which he had done so much to make known to the people in that series of papers, unrivaled in the literature of the world for masterly discussion of the principles of government, since known as the Federalist. These were the leaders, and their state was the battle ground on which for a time depended the fate of the Union. Virginia was the most important of all the states. Its population was as large as that of Pennsylvania and New York combined,

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and included nearly one-fifth of the whole population of the thirteen states. Its geographical position was such that its refusal to enter the Union would have cut the country in two so evenly that it might almost have disputed with Pennsylvania the title of the Keystone State. Parties in it were very equally divided. Marshall was already a federalist. His military experience, as we have from himself, had accustomed him to look upon the whole country as one, and it had taught him how real and how dangerous were the ills that menaced that country. His clear practical sense saw the weakness of the Confederation and made him thus early an advocate of a government strong enough to protect and maintain itself. His abiding faith in the people's patriotism, constancy and innate love of liberty deprived the spectre of imperialism of its terrors. In the community in which he lived the opponents of the Constitution, the state rights party, or Republicans, as they called themselves, were largely in the majority. But his neighbors knew and esteemed John Marshall, and they wanted him as their representative in the convention. But they wanted a pledge that he would vote in accordance with their views. This he refused, and at once entered the canvass with a bold and resolute announcement of his convictions and his action if elected. After a close and earnest contest he was elected. There could be no more convincing illustration of the unflinching courage and integrity of the man, and the weight and influence of his character among the people who knew him. His conduct in the convention was in accordance with his announced views. He ranged himself at once with Madison and Edmund Pendleton, the eloquent Innes and Henry Lee, as a vigorous and untiring supporter of the Constitution, but so even of temper, so conciliatory of manner, and of such strength and force of argument as to be reckoned among the foremost men on his side. Of his speeches in the convention, time only permits the mention of one, and it is significant of the undercurrent of circumstances that was even then shaping his

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future career. The judiciary article of the Constitution was one that the opponents regarded with special animosity, as in it they saw the federal arm reaching across state lines and enforcing the central authority. Marshall's speeches on this article were regarded as the ablest and most convincing presentations of the necessity of a strong and independent judiciary and it is notable that in them he foreshadowed the great question that was to arise later, of the power of the judiciary to declare an act of Congress unconstitutional. George Mason had argued that the federal tribunals would absorb the litigation of the country, that the laws of the United States being paramount to the laws of the particular state, there would be no case to which those laws might not be extended. To this Marshall replied that the government of the United States could not go beyond their delegated authority. "If they were to make a law not warranted by any of the powers enumerated, it would be considered by the judges as an infringement of the Constitution which they are to guard. They would not consider such a law as coming under their jurisdiction. They would declare it void." The convention accepted the Constitution by the narrow majority of ten, and not the least of Marshall's services to his country was his part in bringing about that result. The required nine states had adopted the Constitution before Virginia came to a final vote, and the United States would therefore have started even if that vote had been adverse. But without Virginia it would not have been the Union as our fathers and ourselves have known it, and he would be a bold prophet who even now in the light of all our experience would undertake to say that it would have endured.

The next few years were given to practice with ever increasing reputation. In public matters Marshall continued to be an active federalist and especially devoted to the defence of Washington's administration. At public meetings at Richmond he debated with the most distinguished oppo-

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nents, the President's Proclamation of Neutrality between England and France, Jay's treaty with England, the treaty making power of the President and Senate, and the duty of the House of Representatives to make the appropriations necessary to give the treaties effect, and other questions of most serious import, on which the prevailing sentiment of Virginia then was opposed to Washington's policy.

In 1796, he came to Philadelphia to argue the great case of the Virginia debts, Ware *vs.* Hylton, 3 Dallas, 199. In 1777, Virginia had passed a sequestration act, authorizing any of its citizens who owed money to British subjects, to pay it into the loan office and receive a discharge of his debt. The defendant being indebted on a bond to plaintiff, paid the amount into the loan office, and after the treaty of peace was sued on the bond in the United States Circuit Court of Virginia, where he pleaded the discharge, and it was held to be a full defence. The case came by appeal to the Supreme Court, then sitting in Philadelphia, and Marshall was pitted against three of the most eminent lawyers at this Bar, William Lewis, Edward Tilghman and Alexander Wilcocks. He defended first the right of Virginia as an independent state, at war against Great Britain, to confiscate debts, secondly, that it had done so by the Act of 1777, and lastly that the debt being extinguished by confiscation before the treaty, could not be revived by it. It is noticeable that federalist as he was he argued the state rights view even of the third proposition. But he put it upon the ground that Article 4, of the Treaty of 1783, "creditors on either side shall meet with no lawful impediment to the recovery of the full value of all *bona fide* debts heretofore contracted," only included debts existing at that date, and here the debt was no longer existing. It had been extinguished under the Virginia act, and if any remedy existed under the treaty it must be against the State of Virginia, which had received the money. He did not sacrifice his views on the supremacy of national authority in matters of foreign relations, but put his

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argument on the consistent ground of construction of the treaty. He lost his case, but gained great reputation by the candor and strength of his argument. By it his reputation as a lawyer, which had been chiefly confined to his native state, spread over the whole country.

Since his retirement from the Virginia legislature he had steadily declined public office. He had refused the Attorney Generalship of the United States offered to him by Washington on the death of William Bradford, the position of Minister to France also offered by Washington, and on the death of James Wilson, the vacant seat on the Supreme Court, offered to him by President Adams. Fortunately his time for this had not yet come. He declined it and Bushrod Washington was appointed. In all his career there is nothing more notable than the fact that every office he ever held was offered to him without seeking, and accepted with reluctance. No man ever took office under prouder circumstances. His genuine preference was for private life and the practice of his profession.

In 1798, however, the state of affairs between the United States and France had become so threatening that he was persuaded by President Adams to accept the special mission to France in the interest of peace, with Charles Cotesworth Pinckney and Elbridge Gerry. The rude and insulting treatment which the envoys received from the French Directory is one of the most painful episodes in our history, but it is redeemed from humiliation by the dignified firmness of our envoys. Marshall wrote the dispatches to his government, and they gave universal satisfaction. "As state papers" says Judge Story, "there are not in the annals of our diplomacy any upon which an American can look back with more pride." On his return he was received with popular enthusiasm. As he approached Philadelphia where Congress was in session, the City Cavalry and a procession of citizens met him at Frankford and escorted him into the city. Con-

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gress gave him a public dinner, at which the famous reply of Pinckney was first put into the popular form it has ever since retained.

The envoys having had it hinted to them in no uncertain terms that if they expected to be recognized they must offer a bribe to the Directory, had plainly refused, and on being sneeringly asked by Talleyrand's agent if the Americans were too poor to pay a little money, had replied through Pinckney, "America has millions for defence, but not a cent for tribute."

I doubt if any of my hearers under middle age can fully appreciate the potency of that saying. In their time the United States has been too great and too strong for its standing in the community of nations to be questioned. But in 1798 its position was far different. The sanctity of its flag on the ocean was insolently violated by England in its asserted right of search for seamen, and remonstrances were disregarded almost with contemptuous avowal that what consideration they received was due more to concern about Napoleon than to recognition of our rights. The causes which produced the war of 1812, justly called the second war of independence, were already in active operation. On the other hand the conduct of France was equally contemptuous. The insolence of Genet had led to his recall only under the firm demand of Washington, and the French government instead of relying on the gratitude of the American people for the assistance of France in the revolution had demanded aid as a right, and strained almost to the breaking point the forbearance even of the Republicans who sympathized with her. The treatment of our envoys has been already mentioned, and the firmness and dignity of their conduct was approved by all parties. The effect of Pinckney's saying was electrical. It struck the popular heart and became almost a popular war cry. Medals and tokens bearing that legend were struck off in great numbers, and down even to my early days a boy's handful of coppers was apt to contain at least one

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token that passed current everywhere as a cent, but bearing the words, "Not a cent for tribute, millions for defence." The conduct of Marshall won the approval even of his political opponents. Patrick Henry, one of the most vigorous of them, wrote, "Tell Marshall I love him because he felt and acted as a Republican, as an American."

In 1799 at the earnest solicitation of Washington, who in view of the expected war with France had again accepted the command of the army, Marshall became candidate for Congress and was elected. His earliest duty in that post was the sad one of announcing the death of Washington, which he did in a short speech of great power and pathos, ending with the resolutions declaring Washington the first in war, first in peace, and first in the hearts of his countrymen.

In 1800, President Adams offered him the post of Secretary of War, but before he could assume office the Secretaryship of State became vacant, and was accepted by Marshall. The ability, firmness and moderation with which he held the United States to a position of neutrality under the difficulties, foreign and domestic, of the situation, commanded the admiration of his cotemporaries and completed his reputation as a statesman. In his letter of instructions to Rufus King, our Minister to England, he wrote, "The United States do not hold themselves in any degree responsible to France or to Great Britain for their negotiations with one or the other of those powers, but they are ready to make amicable and reasonable explanations to either. The aggressions, sometimes of one and sometimes of another belligerent power, have forced us to contemplate and prepare for war as a probable event. We have repelled, and we will continue to repel, injuries not doubtful in their nature, and hostilities not to be misunderstood. But this is a situation of necessity, not of choice; it is one in which we are placed, not by our own acts, but by the acts of others, and which we will change as soon as the conduct of others will permit us to change it."

Marshall continued to fill the office of Secretary of State

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until the end of the Adams administration in March, 1801, but on the resignation of Chief Justice Ellsworth and the declination of Jay to resume the office, Marshall was appointed and entered upon the duties one hundred years ago to-day.

The Constitution of the United States was the first instance in the history of the world where the whole framework of a government was rested upon and embodied in a written instrument. Leagues and confederations there had been from the dawn of history, based upon treaties and sanctions of various kinds, but resting finally on voluntary good faith or force the *ultima ratio regum.* But of governments this was the first. It had no precedent, as it has had no successor that was not a copy. The germ of the system was undoubtedly found in the colonial charters by which powers of government more or less ample were conceded to the settlers of the colonies which by the Revolution had become independent states. The men who framed the Constitution, in common with their associates in public life, were versed in the history and the principles of free government as perhaps no other body has ever been. They had deeply studied the writings of the fathers of political thought from Aristotle, through Macchiavelli, and Milton and Locke, down to Montesquieu. One of their cotemporaries had but a few years before penned a declaration of the rights of man in terms of imperishable force and beauty.

The Constitution though it had no precedent was framed on the principles of English liberty by men who knew them, both in theory and in practice. They had studied English history and English law, and they worked in the light of both. Blackstone's first volume was published in 1765, and Edmund Burke has recorded that a leading London publisher had sold more copies in the colonies than in England. The common law of England is the most nearly perfect system of remedial justice between man and man,

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and of effectual safeguards of liberty with order, between sovereign and subject, that the world has ever seen. And its noblest and most legitimate daughter is the Constitution of the United States. The feature of the Constitution, which is, or was, its novelty as well as its crowning excellence, is the clear line it drew between the different functions and powers of government. The wonder and despair of foreign jurists to understand, is the complicated but perfectly adjusted balance in the division of powers between the Federal government and the states, the *imperium in imperio* which leaves to each state the general regulation of domestic affairs touching its citizens in their daily life, yet vests in the United States such direct contact and control as replace the weakness of the Confederation and substitute powers of self-protection, brought home to the people in their individual capacity so that they are made to feel that the Union is as much their government as is that of the state in which they live, and yet without any thought of clash of jurisdiction. Familiar to us as a tale that is told, we are apt to forget the perfection of the unprecedented achievement, the knowledge and discrimination with which the separation was conceived in theory and the clear and abiding judgment with which the lines of demarcation were laid down in practice. The latter was largely the work of John Marshall.

The distinction between the powers of government, as legislative, executive and judicial, was evolved in practice from the long struggles of English liberty, and came to us as an inheritance. It was put into philosophic form by the brilliant Montesquieu from his admiring contemplation of English history. But it was never before so clearly and firmly drawn as in the Constitution. England made her judges personally and politically independent, but the Constitution of the United States first made the judiciary as a department of the government not only independent, but equal, and, therefore, supreme within its own province.

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The conception of a judicial department was a logical necessity of the scheme of government which the Convention had projected. Without it many of the most serious defects of the Confederation would still remain. But the form which it should receive was the subject of anxious thought and much difference of opinion. The most imminent danger to be guarded against was from the states, any one of which might at any time pass a law contrary to the Constitution. How should such a law be rendered harmless? It was proposed that Congress should have a veto upon the laws enacted by the states. But it was at once foreseen that the exercise of this veto would be subject to political influences and passions, and would lead to a direct and open conflict between Congress and the state legislature. Another plan was to establish a Council of Revision, to be composed partly of the executive and partly of the federal judiciary, to whom this veto power should be entrusted. This plan was analogous to the system with which the people were already familiar. In Pennsylvania and most if not all of the other colonies having popular legislative assemblies, the Crown, acting through the Judicial Committee of the Privy Council, exercised the power of annulling, or refusing assent to the acts of such assemblies. But this power, though admitted and unquestionable by the colonies, led to protracted disputes. There is no more interesting and instructive chapter in Pennsylvania history, than the persistent, unremitting and ingenious efforts of the Assembly to have its own way by the re-enactment often in forms only colorably varied, of statutes set aside by the Privy Council. Such a conflict between a state and Congress was full of foreboding of peril.

But the danger of departure from the Constitution was not alone to be apprehended from the states. The Executive vested in a single head might usurp powers beyond even its ample constitutional authority. Out of such usurpation had come the dictators, the kings and emperors of the past. And again Congress was not to be left altogether without

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restraint. The legislative branch, which holds the nation's purse, is always the most powerful in a free government. The colonists had fought George the Third, but the Convention did not forget that his Parliament was as tyrannical as the king.

Out of all these most serious considerations, came finally the establishment of a single Supreme Court with jurisdiction over all questions arising under the Constitution and laws of the United States. The honor of having proposed the plan which was substantially adopted, belongs to William Paterson of New Jersey, afterwards a justice of the court he was thus instrumental in creating.

The court thus established, though the logical and perhaps inevitable outcome of the traditions, the ideas and the circumstances of the men who made it, was nevertheless a bold and unprecedented conception. For the first time in history a co-ordinate branch of a sovereign government, it was yet the weakest branch. More independent, less directly responsible either to the other departments or to the people at large, yet holding neither the purse nor the sword, its authority depends wholly upon reason. But how transcendent is its authority; to mark the limits of legislative and executive power; to administer the law and give commands not only to individuals, but to presidents and congresses; to sit in judgment on the proceedings and privileges of sovereign states; and to give final form and effect to the great charter of the Union, on which the rights, the peace, the harmony, the prosperity, safety and honor of the whole country depend. Well did de Tocqueville say "a more imposing judicial power was never constituted by any people. The Supreme Court is placed at the head of all known tribunals, both by the nature of its rights, and the class of justiciable parties which it controls." It was a conception worthy of a free people, and possible only to a people convinced beyond all doubt or hesitation, that lasting and orderly liberty can exist only in complete subor-

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dination to law. "None but a law fearing people," says Prof. Dicey, "will be inclined to regard the decision of a suit as equivalent to the enactment of a law. The main reason why the United States has carried out the federal system with unqualified success, is that the people of the Union are more thoroughly imbued with legal ideas than any other existing nation."

Into this great tribunal as its chief, one hundred years ago to-day came John Marshall, henceforth forever to be identified with it as the embodiment and greatest exponent of judicial thought.

The justices of the Supreme Court need to be jurists in the wide sense of that term as distinguished from mere lawyers, however learned, and they, especially the Chief Justice, should be statesmen with a broad appreciation of the bearing of even technical questions of law, upon the fundamental principles of government, the polity and the course of events in the country. Let us look for a moment at Marshall's wide and varied, though unconscious training for such place. *Nihil simul inventum est et perfectum,* in the quaint expression and always interesting aphorisms of Coke. Even the powers of John Marshall did not spring like Minerva, full grown, from the brain of Jove, but year after year like the tree that is planted in fertile ground, grew to maturity alike through sunshine and storm. His substantial military service in his youth had matured and sharpened his perceptions, his energies, his resolution, the practical faculties of life; his service of years in the Virginia legislature had made him familiar with public questions of government and policy, and later he had studied legislative matters in the broader field of Congress; as a member of the Virginia State Council he had learned to consider methods of administration as well as of legislation and this experience was again widened in the national cabinet as Secretary of State; and his service as Minister to France had shown him the

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devious ways of diplomacy. But where in all this busy life did he find time for the learning and knowledge of the law? His training even in the routine of litigation was not inconsiderable. He was by choice and desire a lawyer, he maintained his position at the bar uninterruptedly as far as compatible with the full performance of his public duties, and he returned to practice promptly at every opportunity. That he was profoundly versed in legal principles is manifest in every page that he ever wrote. He worked on them and from them always. But if we speak of technical knowledge of cases and precedents, and the law as laid down by the voice of authority, let us say frankly he has been surpassed by many others. He had not the learning of Kent, or of our own Tilghman, or of his most learned successor, Taney. But he had that which for his time and place served him far better, the lawyer's instinctive perception, an unerring logic in reasoning and a vigor of intellect that went *per saltum* where others had to climb laboriously through the maze of decisions. It is related of him by high authority, that not unfrequently at the end of a long and close argument on some intricate and knotty question, listened to with most exemplary patience, he would turn cheerfully to his younger colleague and say, "Well, Story, the law is so and so—look up the authorities and see if it isn't." And that learned and accomplished book-lawyer always found that the Chief Justice was right. No man of equal eminence ever owed less to teaching and to what is usually called education. But no man ever had his natural powers more perfectly developed by experience in the school of life, leading up to his crowning work. Fortunately the questions with which he had to deal required less book-learning than wide grasp of principles. The constitution is expressed with remarkable compactness in general terms, and it has been well said that it is "an enumeration of powers, not a definition of them." The definition of them was to be the work of Marshall and the court. When at the age of forty-five he took his seat

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upon the bench, little did he or his cotemporaries anticipate that his distinguished public career of a quarter of a century, was to be so completely overshadowed that it requires the special study of this occasion to recall its extent, its variety and its eminent usefulness.

In 1801, so little had the importance of the position been perceived that the learned, accomplished and patriotic Jay thought himself going to rust in the Chief Justiceship, preferred to be Governor of New York, and finally resigned to go as envoy to England. The court has as yet made but little impression on the jurisprudence of the country. The powers and limitations of the Constitution had been discussed, often with partisan heat and violence, in legislatures and conventions, but no principles of construction had been judicially settled, and the decision of the Supreme Court in the only important case that had yet come before it, Chisholm *vs.* State of Georgia, 2 Dall., 419, in which it was held that a state might be made defendant in the Federal Courts at the suit of an individual, had not only roused the wrath of the State Rights Party, but so startled even the Federalists, that it led to an amendment of the Constitution. But questions were already looming up, full of ominous import, which could not be long delayed; questions of the inherent powers of the states as sovereignties, how far they had been surrendered to the central government, how far they had been retained, how far they were exclusive in one or the other or might be exercised concurrently; questions of the obligation of contracts including chartered rights and their protection by the Federal Courts from impairment by the states; questions of the regulation of commerce and the navigation of rivers between states and with foreign countries, as against state laws; questions of the restraints upon the issue of money by the states, and of taxation by the states of Federal offices, or corporations; questions of jurisdiction between state and Federal courts, including the control of state

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courts over Federal officers, and the revision by the Federal courts of the decisions of state courts on constitutional questions. And underlying all these was the fundamental question on which the solution of all of them was largely to depend, the strict or the liberal construction of the Constitution as an entire instrument. None of these questions had been decided and there were no precedents to guide the decision. The science of constitutional law, as now known to us, had as yet no existence. Under the institutions first inherited from the mother country, and then made the models on which our own were reconstructed, lawyers and judges had been trained to view the legislative power vested in Parliament as infallible and omnipotent. That first lesson had to be unlearned, and a new field of jurisprudence opened.

Into this untrodden field the new Chief Justice entered with the firm step of conscious strength, trusting to his own clear perceptions and honest singleness of purpose to find the way. And how plain and broad and straight the way seems when he has once pointed it out.

Let me take one general illustration, the great question which as I have said underlies all the others, that of the strict or the liberal construction of the Constitution as an entire instrument. It had been the subject of earnest, sincere and settled difference of opinion among some of the wisest statesmen of the day, and perhaps even more frequently of partisan and violent dispute. It may be said that it exists yet and will always exist, for it is inherent in the nature of the subject, the imperfection of language, and the varying temperaments of those who interpret it. In statutes, in private contracts and most of all in wills, it is part of the lawyer's daily work to ask, shall we adhere to the letter, or shall we look beyond it for the intent? The states, said the strict constructionists, the State Rights party, are independent sovereignties, the source of all political power; for certain expressed purposes they have transferred limited portions of that power to the Union, but in so doing they

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have only appointed an agent, and such agent has no power not literally within the terms of his appointment; if authority is not shown in express words, it does not exist. The United States, said the Federalists on the other side, is not a mere league but a government; with delegated and limited powers it is true, but nevertheless a government, and possessed of all powers inherent in the conception of a government, unless expressly withheld or prohibited in the instrument creating it. The Chief Justice took up the question in the very essence of judicial spirit. In politics he had been a life long Federalist, and the champion of their views in many hard fought contests. But as a judge he saw only with the clear light of the law. The Constitution, he said, was to have neither a liberal nor a strict construction but a natural one, according to the intention as shown by the words understood in their natural and usual meaning. The Union was a government of delegated powers. Therefore, when any power was claimed, the warrant for it should be clearly shown in the Constitution, and to that extent the construction must be strict. But though only of delegated powers, it was nevertheless a government, and must possess the full measure of all the powers intended to be given. Therefore the construction must be liberal as to every means of exercising the powers given, with full effect. How plain and how easy the solution seems when once it is said. Do not even my unprofessional hearers see what plain common sense it is? A platitude that even the incipient law student could answer off-hand. But when John Marshall first said it, it was new, and it is a platitude to-day because he said it in such terms that no man could fail to see its solid good sense, the foundation of all permanent law.

In this spirit the Chief Justice took up the varied questions as they arose, and discussed and decided them. Time and the limitations of a spoken address do not permit even a bare enumeration of the cases as they arose, or the

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points they involve, but speaking to-day as a lawyer to lawyers, I may make brief reference by way of illustration only to a few of them.

Marbury *vs.* Madison, 1 Cranch, 137, was the first and in some respects the most important of the cases I shall mention. Marbury was appointed a justice of the peace in the District of Columbia by President Adams, was confirmed by the Senate, his commission signed by the President and passed under the seal of the State Department, but before it was delivered the administration changed and under instructions from President Jefferson, Secretary Madison refused to deliver it. The suit was for a mandamus to compel delivery. The court held that it had no original jurisdiction except that fixed by the Constitution and that the Act of Congress giving it jurisdiction in such cases was to that extent void. The case is notable in that holding that it had no jurisdiction to issue such a writ, the court's opinion on Marbury's title to the office, and the power of the judiciary to compel the performance of duty by executive officers was obiter. But the Chief Justice stating that the novelty and delicacy of some of the questions required a complete exposition of the principles on which the opinion of the court was founded, entered into the subject at large, and vindicated the power of the court to declare an Act of Congress void for unconstitutionality. This point had been decided more or less explicitly before. Indeed it was a necessary conclusion from the equality of the judiciary as a co-ordinate branch of the government. But it encountered very resolute and even passionate political resistance, both from the legislative and the executive branches, had been touched tenderly and with reluctance, even by Marshall himself in the debates on the Constitution, and had never commanded general acquiescence, nor received an authoritative exposition.*

* For the following very complete note of the prior cases I am indebted to Ardemus Stewart, Esq., of the Philadelphia Bar. Comm. *vs.* Caton, 4 Call 5, (Va., 1782); Cases of the Judges of the Court of Appeals, 4 Call 135 (Va. 1788);

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The court, however, went a step farther and asserted the duty and power of the judiciary to compel obedience to the law in all matters not political or discretionary even by the highest executive officers. This decision was of transcendent importance in establishing the principles on which all our present views of constitutional law rest. It settled once for all that the Constitution had created a government of law, and it established the authority of the court on a footing never since shaken, as the final interpreter of the Constitution and the supreme tribunal for the settlement of all matters, even though touching the other departments, that are judicial in their nature.

Trevett *vs.* Weedon (R. I. 1786), Arnold's Hist. of R. I., Vol. 2, ch. 24, and see Cooley's Constitutional Limitations 193, n. 3; Den on demise of Bayard *vs.* Singleton, 1 Martin 48 (N. C., 1787); Ogden *vs.* Witherspoon, 2 Haywood 227 (N. C., 1799); Bowman *vs.* Middleton, 1 Bay 252 (S.C., 1792); Austin's Lessee *vs.* Trustees, etc., Pa. 1793, referred to in Emerick *vs.* Harris, 1 Binney 416; case of Holmes and Walton, and Taylor *vs.* Reading, in New Jersey, cited by Kirkpatrick, C. J., in State *vs.* Parkhurst, 4 Halsted (9 N. J. Law), 427; Van Horne *vs.* Dorrance, 2 Dall. 304 (1795).

On April 5, 1792, the Circuit Court for the District of New York, consisting of Chief Justice Jay, Justice Cushing, and Duane, District Judge, declared it as their unanimous opinion that the pension law passed by Congress, on March 23, 1792, was invalid, because it attempted to assign to the judicial department duties which were not judicial; on June 8, 1792, the Circuit Court for the District of North Carolina, made a similar declaration in a joint letter, addressed to the President of the United States; and on April 18, 1792, the Circuit Court for the District of Pennsylvania addressed a similar joint letter to the President. Somewhat later in the same year, the Supreme Court of the United States, in Hayburn's Case (1792), 2 Dall. 409, refused to carry the act into effect.

In Emerick *vs.* Harris (1808), 1 Binn. (Pa.), 416, the right of the courts to pass upon the constitutionality of an Act of the Legislature was asserted, though the act in question was held to be constitutional. Mr. Justice YEATES stated that Marbury *vs.* Madison was not published until after his opinion had been prepared.

The constitutionality of statutes had been argued without expressly stating the power of the Court to declare them void, if unconstitutional, in several other cases, *e. g.*, Hilton *vs.* United States (1796), 3 Dall. (U. S.), 171, where the statute was held constitutional, and Respublica *vs.* Cobbett (1798); Respublica *vs.* Duguet (1799), and Respublica *vs.* Franklin (1802), unreported cases in the Supreme Court of Pennsylvania, cited by Mr. Justice YEATES in his opinion in Emerick *vs.* Harris (1808), 1 Binn. (Pa.), 416, 422.

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In U. S. *vs.* Peters, 5 Cranch, 115, a conflict of jurisdiction had arisen between the Pennsylvania and the Federal courts of admiralty over a question of prize, and Judge Peters had been reluctant to enforce a judgment which might bring on a collision. But the Supreme Court without hesitation laid down the rule of the superior authority of the Federal Courts and the total invalidity of state statutes interfering with it.

In Fletcher *vs.* Peck, 6 Cranch, 87, the clause of the Constitution prohibiting the states from the passage of any law impairing the obligation of contracts, was construed and applied to grants of land by a state. In State of New Jersey *vs.* Wilson, 7 Cranch, 164, the same clause was held to prevent a state taxing lands which had been purchased by the colony under convention with the Indians, with an agreement that they should not be taxed thereafter. And in Trustees of Dartmouth College *vs.* Woodward, 4 Wheaton, 518, the same clause received a masterly and final exposition and extension to the protection of the charter of a private corporation. This is perhaps the most noted of all Marshall's decisions, on account of the wide public interest it excited, its far-reaching consequences, and the eminence of the counsel on both sides, including Joseph Hopkinson, Daniel Webster and William Wirt.

In Sturges *vs.* Crowninshield, 4 Wheaton, 122, the impairment of the obligation of contracts was further considered in connection with the authority of the states to pass insolvency and bankruptcy acts, not in conflict with a national bankruptcy law.

McCulloch *vs.* State of Maryland, 4 Wheaton, 316, was a case of great importance. Congress had chartered the Bank of the United States, and a branch having been established in Baltimore, the State of Maryland levied a tax upon it, which the bank refused to pay. The state courts gave judgment against the bank, but the Supreme Court reversed it. The opinion of the Chief Justice was a masterly exposition of

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the liberal construction of powers granted. He held that the United States possesses authority to employ all means appropriate and convenient, as well as those absolutely necessary for the full exercise of powers specifically granted to Congress by the Constitution; that a bank was a legitimate instrument of the financial power; that the states cannot burden or impede the exercise of the federal powers by interference with their instruments, and that as the power to tax implies the power to burden to the extent of destruction, the states cannot tax any of the federal instrumentalities. In the course of his opinion the Chief Justice said, "The government of the Union is a government of the people. In form and in substance it emanates from them. Its powers are granted by them, and are to be exercised directly on them and for their benefit"—the same thought which was put into lasting popular form in Lincoln's expression, "Government of the people, by the people and for the people."

Time does not permit further details, but even from these illustrations it will be perceived how serious the questions were, how deeply they reached into the very foundations of government, and how materially and permanently they affected all constitutional questions that were to come. It is true that Marshall had a clear field. He had no light from precedents, but he had no obstructions from them. As a matter of mere legal construction he might have decided many questions differently, and no lawyer then or since could have said with confidence that he was wrong. But he had one steadfast guide through all the conflicting claims and theories, the firm conviction that the Union under the Constitution was a national government, and that as a weak government could not conduce to orderly and lasting liberty, the United States, as a government, must possess powers adequate to protect and preserve itself. In 1834 the legislature of South Carolina, under the express sanction of the Nullification Convention of 1832, had prescribed a test oath for its militia officers, and the question of its constitutionality

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came before the Court of Appeals in the case of State *ex rel.* McCready *vs.* Hunt, 2 Hill (S. C.). 1. The majority of the court held the oath unconstitutional, Harper, J., dissenting. In a private letter to one of the distinguished counsel in the case, Thomas S. Grimké, acknowledging the receipt of a copy of the opinions, the Chief Justice wrote: "Judges Johnson and O'Neall appear to have decided the question on the Constitution of the state; Judge Harper takes into view the Constitution of the United States. His opinion unquestionably displays talent and acute reasoning powers, but is obviously founded on the assumption that our Constitution is essentially a LEAGUE and not a GOVERNMENT.*

"This is the true and substantial dividing line between parties in the United States. One of more vital importance cannot be drawn. As the one opinion or the other prevails, will the Union, as I firmly believe, be preserved or dissolved. If a mere league has never been of long duration, if it has never been of sufficient efficacy to preserve a lasting peace between its members, we must be irrationally sanguine to indulge a hope that ours will furnish an exception to any and every thing which has heretofore occurred in the history of man. If such be the true spirit of the instrument such must be its construction, but we cannot, I think, fail to ask ourselves for what purpose was it made? Was it worth the effort of all the wisdom, virtue and patriotism of the country merely to exchange one league for another? Did the convention—did the people—believe that they were framing a league and not a government?"

The underlying principle on which the permanence of the Union under the Constitution must depend, came, it is true, to the final arbitrament of the sword. But the conflict, perhaps inevitable, came in the fullness of time with a north grown superior in numbers and resources, and a great west as a controlling factor, and was fought out on that side by three generations of men grown up in profound belief and

*The capitals are the Chief Justice's.

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reverence for the supremacy of the national government as declared by Marshall. And when slavery, the exciting cause of contention, was ended in the only way that Marshall thought it could be, by a great social convulsion or civil war, the Constitution and the Union, as he expounded them, resumed their hold on the affections of a united nation.

How important was a right start, and how much we owe to the firm hand that carried the Constitution through its formative period of trial and experiment we may see by a glance at the consequences of a different line of decision. Let me take a single illustration. A hundred years ago this active, ingenious, energetic, tireless people found themselves in possession of a vast and fertile continent whose original inhabitants were so few, so scattered, so inferior, so heathen, that their rights need not be regarded—a view, let us say with humility, if not with shame, that the race has not yet lost on either side of the ocean. The boundless opportunities that were to open to the near future were then but dimly if at all foreseen. The "west" began at Pittsburgh, which was remoter from Philadelphia in time, and infinitely so in accessibility, than San Francisco is to-day, and the "far west" ended with the French settlements on the banks of the Mississippi. Three years were yet to elapse before the heroic expedition of Lewis and Clark was to set out to explore whither the great wilderness of the west would lead. Railroads were not yet, and steamboats were but among the experiments of Philadelphia's inventors. In this condition of things the state of New York granted to Livingston and Fulton an exclusive right of navigation of the waters of the state with vessels moved by fire or steam, and a few years later this right was sustained by the highest courts of New York by an injunction against the owner of a steamboat plying between the city of New York and Elizabethtown, with a license under the navigation act of Congress of 1793. The case under the name of Gibbons *vs.* Ogden, 9 Wheaton, 1, came by appeal to the Supreme Court, and the decision was

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reversed. The Chief Justice, in one of the greatest of his opinions, vindicated the supremacy of Congress on all questions of the regulation of commerce and laid down the canon of construction by which the commerce clause of the Constitution has been read from that day to this. Consider for a moment the effect had the court taken the other view and sustained the New York decision. If every ferry boat that crossed the North River could do so only under license from New York or the grantees of her monopoly, if every boat load of lumber or of coal from the Allegheny and the Monongahela had had to run the blockade of license and pilotage fees and commercial regulations of every state between the line of Pennsylvania and the Gulf of Mexico, how long would the spirit of our people have endured such shackles to free movement? The wonderful development of mechanical invention, and the steady sweep of material progress would have soon burst the bonds of such narrow construction, and he would be a bold man to say that in the breaking of the court's construction the authority of the court and even the Constitution itself, not yet matured and settled in the confidence of the nation, might not have been destroyed by constant change or open and flagrant violation.

It would be too much to claim that even the broad foresight of Marshall had measured the force of the under current of development leading to the unprecedented career that lay before his country. But he knew his countrymen, their history and their institutions. He knew that the spirit of the people was fast molding a harmonious and homogeneous nation, which must be bound together by a national constitution. And he labored in the spirit of a patriot, a statesman, and, above all, a far-seeing judge, to make the bond strong enough to endure inevitable strains, yet elastic enough not to break with expanding empire. To be thus man of practical affairs for his own day, yet prophet in his foresight for the years to come, what higher summit could there be in the achievements of human judgment, patriotism and wisdom?

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In the four and thirty years that he sat in judgment the court made fifty-one decisions on constitutional questions, and the Chief Justice wrote thirty-four of them. In only one did the majority of the court fail to agree with him. In Ogden *vs.* Saunders, 12 Wheaton, 213, the construction of the bankruptcy clause in the Constitution arose, with respect to the exclusion of state legislation on the subject. Three judges, including Marshall, thought the power of Congress exclusive, but the majority held that the states might legislate on the subject except where the power is actually exercised by Congress and the state laws conflict with the law of Congress. In the three-quarters of a century that have elapsed since then, we have had bankruptcy acts passed and repealed by Congress, insolvency laws of every variety of scope and effect passed and repealed and passed again by state legislatures, and the subject cannot be said to be settled yet. In the light of all this additional experience the best lawyers of to-day are far from sure that the opinion of the Chief Justice was not the wisest and most correct.

In speaking of Marshall, we do not forget that he had learned and able colleagues, and was aided by an exceptionally brilliant and able bar. But he was easily the master of them all, and by the pure force of reason, especially on constitutional questions, he dominated the court with the free consent and admission of his brethren. In 1811 President Madison appointed Joseph Story to the Supreme Court for the undisguised purpose of neutralizing the influence of Marshall. Story was young, aggressive, and, as Josiah Quincy says, "A bitter Democrat in those days." But he came under the influence of Marshall, and, like the others, he soon yielded to the weight of superior intellect and force of character. He became an affectionate and admiring disciple, and the friendship lasted throughout his life—a friendship highly honorable to both men; to Story that he had the breadth and largeness of mind to become and confess himself a convert, to Marshall that he could make of such an antagonist an admiring follower.

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More than half a century ago Henry Brougham said that no judge could afford to be often wrong, and the time had gone by when any court could rest long on mere authority. It must justify itself by its reasons. No tribunal was ever more dependent on this principle than the Supreme Court of the United States, and no judge ever sustained the burden with more unfailing strength than Chief Justice Marshall. He brought to the judicial office as we have seen, a profound knowledge of the history and institutions of his country, a political sagacity trained by long and varied experience in the legislative and administrative departments of the government, a firm and comprehensive grasp of the fundamental principles of law, and above all an unswerving fidelity to the highest conceptions of judicial duty. Through all the intricacies of conflicting evidence or discordant principles his intuitive perceptions saw the connection between premises and conclusion, and with an unrivaled grasp of every phase and bearing of the subject his vigorous and unerring logic marked out the path with such cogent and convincing reasons as to meet the criticism of opposing views, and still more to stand the test of the future in the development of corollaries and consequences. His intellectual integrity and courage took him straight to his conclusion, turning his eye neither to the right nor left for irrelevant objects by the way.

It is related of the great literary autocrat of the eighteenth century, that he said of a future Lord Chancellor, "I like Ned Thurlow, he lays his mind fairly against yours, and never flinches." If Dr. Johnson had known John Marshall he would have liked him for the same reason. He never flinched. He never underestimated or understated the strength of his opponent's position, or the difficulties of his own. He laid his reason bare for all men to see and to challenge, and those who would not be convinced against their will were at least silenced by their inability to refute him. Even the caustic and unfriendly John Randolph said "I know John Marshall's opinion is wrong, but there is no man in the country who can take it up and show how it is wrong."

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In this country the prominence and importance of Marshall's opinions on constitutional questions have absorbed our attention. But abroad, outside of special students of American institutions, such as Bryce and Sir Henry Maine, his reputation rests largely on his judgments in admiralty and international law. In these he ranks with Lord Stowell. The breadth of his views was prophetic. He held that the English doctrine limiting the admiralty jurisdiction to tide waters could not properly be applied to our great rivers, but that the test should be navigability from the sea. And he was among the earliest to recognize that our great lakes were inland seas and the law should so treat them.

The opinions of Marshall are models of judicial style. No legal writings were ever freer from technicalities of language or thought. In plain words which reach even the unlearned understanding, without ornament, and absolutely devoid of flourish or by-play or looking to side effects of any kind, they present a calm and steady flow of pure and sustained reason from postulate to conclusion. And they read to the lawyers of to-day, as they read to the lawyers in the cases they decided, for the argument has no trace of personal, or party, or temporary considerations. Though his individual convictions were deep and strenuous and the contests of his time were fierce and unsparing, his personality no more appears than the personality of Shakespeare in Hamlet or Macbeth. He wrote as Shakespeare wrote, not in the taste or fashion of his age, but on the foundations of human wisdom in the light of pure and enduring reason. And he wrote as Thucydides wrote, not for a day but as a possession for all time.

From Marshall's assumption of the Chief Justiceship his life is necessarily identified with his judicial career. But at least a passing mention must be made of two or three incidental matters.

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On the death of Washington his papers passed into the possession of his favorite nephew, Judge Bushrod Washington, at whose urgent solicitation Marshall undertook the writing of his life. It was a great labor, performed in the midst of exacting judicial duties. It is in reality a history, and indeed the first volume was revised and issued separately as a school history of the United States. It was, however, laid out on too large a plan as a biography, and the result is somewhat cumbersome. But it is a storehouse of information, clear and authoritative narration, and sound judgment on men and affairs at the birth and early days of the republic.

In 1807, occurred the first and in many respects the greatest of what may be called our state trials, that of Aaron Burr for treason, before the Chief Justice at Richmond. The circumstances are familiar and I need not recount them. But I make this passing mention of the trial as it shows by a shining example the impartiality and fearlessness of Marshall. Burr was detested by the Federalists as a leading and violent Republican, and there was added to this political antagonism a personal animosity against him as the slayer of the beloved Hamilton. On the other hand his treacherous effort to supplant Jefferson in the choice for the presidency when the accident of the vote in the electoral college under the first system provided in the Constitution, gave him an apparent but wholly unintended opportunity, had drawn upon him the vindictive wrath of his own party. Jefferson was President, and the whole energies and influence of the administration were exerted for the prosecution. Never certainly in America was a prisoner brought to the bar of a state trial under a fiercer hue and cry, popular and official, for conviction, and before a judge personally and politically hostile. And never were the scales of justice held with steadier and more impartial hand. The Chief Justice took his stand on the clear text of the Constitution that treason against the United States shall consist only in levying war against them, and no person shall be convicted unless on the testimony of two

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witnesses to the same overt act, and he held this position resolutely against all the arguments and almost threats of the prosecution, backed by the whole administration. The result was an acquittal and it was bitterly said that "Marshall has stepped in between Burr and death." A storm of angry disapproval burst forth from both parties, but the Chief Justice went calmly on, swerving neither to right nor left, confident in his own rectitude and the approval of his conscience. He outlived the censure even of his opponents, and his countrymen to-day may proudly challenge the annals of jurisprudence to show a more signal exhibition of judicial impartiality and courage.

The last public service that the Chief Justice rendered to his native state was his attendance at the Convention of 1829, to revise the Constitution. It was a very notable assemblage, which included in its membership the venerable ex-presidents, Madison and Monroe, Chief Justice Marshall, William B. Giles, the Governor of the state, John Randolph of Roanoke, Philip P. Barbour, Benjamin Watkins Leigh, Littleton W. Tazewell, and others hardly less distinguished. Even among these the Chief Justice was a conspicuous figure, and his views commanded great attention. I must content myself with a reference to only one, his successful effort in behalf of the independence of the judiciary. "The judicial department," he said, "comes home in its effects to every man's fireside; it passes on his property, his reputation, his life, his all. Is it not to the last degree important that he should be rendered perfectly and completely independent, with nothing to influence or control him but God and his conscience? * * * I have always thought from my earliest youth until now that the greatest scourge an angry Heaven ever inflicted upon an ungrateful and sinning people was an ignorant, a corrupt, or a dependent judiciary."

Though we are met to-day to commemorate especially his judicial career, yet we should fail to do full justice to

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the occasion did we not turn our attention for a brief time to his personal qualities. For the man was as nearly perfect as the magistrate. His cheerful fortitude in youth under the hardships of Valley Forge, I have already mentioned, and it never forsook him. His feelings were warm and his opinions firm, but a heart of universal kindness governed his actions and his manners. I have searched every memoir and reminiscence and anecdote, and found no single instance recorded of an exhibition of temper, unless it may be implied in the terms of Horace Binney's comment on his patience, "when he ceased to hear it was not because his patience was exhausted, but because it had ceased to be a virtue." But that he had a temper there can be no doubt. He could not have been the judge he was, without it. No judge can afford to be without a firm temper, just as no judge can afford to let his temper break out of control. The fact that it is known to be there if it is called for, suffices for all but the most extraordinary occasions. And no man that has knowledge of the unparalleled rancor of the political and personal passions of that time can read the trial of Aaron Burr without feeling that the calm and impartial serenity with which the Chief Justice held in check the violence of both prosecution and defence, had behind it a firmness of temper which even the representative of the government could not venture to encounter.

His domestic affections were warm and enduring. At an early age he married a charming girl, for she was but little past fifteen, and they lived together in unchanging affection for nearly fifty years. Her loss he never ceased to regret, and during the three years between her death and his own, it is said he never omitted to visit her grave at least once a week.

His most striking quality in private life was the unaffected simplicity of his character and manners, the lack of all vanity, or affectation, or assumption of superiority.

In some reminiscences of him furnished to the *Louisiana*

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Law Journal, by a cotemporary, Mr. Gustavus Schmidt, afterwards a distinguished member of the New Orleans Bar, I find the following just and graphic description:

"In ordinary life the conduct of Mr. Marshall was affable and polite, and when entering the court room, which was usually before the appointed hour, for he was extremely punctual in the discharge of his duties, his conversation was cheerful, and evinced a remarkable freedom of mind, which in men of eminent attainments in any particular science, is almost an invariable criterion of superiority of intellect.

"In his colloquies on such occasions with the members of the bar, which were frequent, no attempt was ever made to claim superiority, either on account of his age or his great acquirements; neither was there any effort to acquire popularity; but his conduct was evidently dictated by a benevolent interest in the ordinary affairs of life, and a relish for social intercourse. The moment, however, he took his seat on the bench, his character assumed a striking change. He still continued the same kind and benevolent being as before; but instead of the gay and cheerful expression which distinguished the features while engaged in social conversation, his brow assumed a thoughtfulness and an air of gravity and reflection, which invested his whole appearance with a certain indefinable dignity, which bore, however, not the slightest resemblance to sternness. The impression made on the beholder was that of a man engaged in some highly important and grave deliberation, which he apparently pursued with pleasure, but which at the same time seemed to absorb his whole attention and require the full exercise of his faculties."

That he had a just confidence in his own powers is manifest in the direct and straightforward way in which he grappled with the most difficult problems that came before him. But it was a confidence free from all vanity and conceit. The Hon. Charles Augustus Murray, grandson of Lord Dunmore, the last Royal Governor of Virginia, wrote of

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his travels in America and speaking admiringly of Chief Justice Marshall, said that the only indication of vanity he showed was the hospitable one of being able to give his guests the best glass of Madeira in Virginia. His great-granddaughter has told us that he brought the wine from France in 1798, and it was carefully preserved in the family for use at weddings and special occasions. And it adds a touch of pathos to the memory of the kindly and hospitable patriot, that thirty years after his death, some of his wine was sold to repair the fortunes of his descendants who had suffered by the unsparing hardships of civil war. "And so," writes his great-granddaughter, "it came by the fortunes of war that I drank my great-grandfather's wine in a stranger's house."

In this connection there is another anecdote of pleasant interest. The Hon. Josiah Quincy, when a young man, accompanied Judge Story to Washington, and in his "Figures of the Past," relates that the judges of the Supreme Court usually dined together, and their custom was to allow themselves wine only when it was raining. But "the Chief," said Story, "was brought up on Federalism and Madeira," and occasionally even on a sunshiny day would say, "Brother Story, will you step to the window and see if there are signs of rain?" Story would be obliged reluctantly to report that he saw none, whereupon the Chief Justice would say cheerfully, with a gleam of humor in his piercing eyes, "Well, this is a very large territory over which we have jurisdiction and I feel sure it is raining in some part of it. I think we may have a bottle to-day."

In person, he was plain, and, it is said, without advantages of appearance, voice, attitude or manner. He was very tall and thin, and careless though not untidy in his dress. Josiah Quincy says that he was plain and almost rustic in appearance, and might easily be taken for "an ordinary political judge" until you encountered his brilliant eyes. In his youth he was active and athletic, and he remained in vigorous good health almost until the last. Mr. Binney relates

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that in 1775, as a youth of nineteen, Marshall walked ten miles to the militia muster, and back again in the evening, having in the meantime drilled his company and afterwards addressed them on the issues of the impending revolution. In 1832, when seventy-seven years of age, he wrote his son that he walked daily two miles to the court and back again to dinner. He never failed, when at home, to attend the meetings of the Richmond quoit club, of which he was an honored and always welcome member, and it is related that when an old man he could still throw a three-pound quoit to a fifty-foot hub with almost unerring accuracy. I do not know how much my younger hearers, particularly those of city birth, in these days of tennis and golf may know of that time-honored and classic game, but even down to my day it was almost the only out door game in which grown men indulged. I have played more than once with the late Chief Justice Sharswood, and have seen him triumph in a successful "ringer" with the zest of a boy.

There are many portraits of the Chief Justice, but most of them by inferior artists who failed wholly to catch or portray the spirit and character of the man. The profile by St. Memin, being taken with the physionotrace, is of course mechanically accurate, and St. Memin being an artist of ability has given us an interesting and valuable likeness by which to test the others. But being in profile we miss the alert and beaming eye which was the noticeable feature of the face. The standard and only satisfactory likeness is the one painted by Henry Inman for the Philadelphia Bar. which now hangs in the library of the Law Association of this city. It gives us the mature man, with all the qualities that his cotemporaries ascribe to him—the thin, rather small face, the broad brow with a mass of dark hair growing low down on it, the benignant half smile, and the keen but kindly black eyes that William Wirt said "possess an irradiating spirit which proclaims the imperial powers of the mind with-

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in." The full length portrait by Chester Harding now in the Boston Athenæum, gives a good representation of the tall, thin figure and the general outlines of the face, but the eyes wholly fail to indicate the "irradiating spirit." In this respect the portrait is little better than the many silhouettes that show, both sitting and standing, the long, thin limbs, the round head and small features which made up his general appearance. The eye was the electric lamp that lighted up the whole countenance, and without it the features failed to reveal the vital spirit of the man.*

Philadelphia has special claims upon this celebration, for outside of his own home at Richmond, nowhere was he so known and beloved in his lifetime, or more honored since, than here.

It was in Philadelphia in 1796 that he argued the great case of Ware *vs.* Hylton, which first established his national fame as a lawyer; here, in 1798, on his return from the mission to France, he was received as in a triumphal march by the military and the citizens who went out to Frankford to meet him, and by Congress, who gave a dinner to him at which, as I have already related, Pinckney's famous answer to Talleyrand was put into its sententious popular form; here, in 1799, he took his seat in Congress as a member from Virginia, and, in announcing the death of Washington, crystallized his description into one immortal phrase: here, from time to time in his judicial labors, he so established himself in the affectionate respect of the bar that they, in happy testi-

*Since this address was delivered I have had the opportunity of seeing in the Green Bag for February, a reproduction of a portrait by John Wesley Jarvis which is interesting as presenting Marshall at an earlier age than most of the others. It has the features and shows the darkness of the hair and eyes with the prominence that his cotemporaries uniformly ascribed to his appearance. But the attitude is stiff and conventional and the expression dull and common-place. The countenance has neither the weight of character and benevolent dignity of the Inman portrait, nor even the lighter and more social expression of that by Harding.

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monial, had his portrait painted by Henry Inman; here, from the press of a Philadelphia publisher, he sent forth that storehouse of accurate and impartial history, the Life of Washington; here, to the pre-eminent skill of Philadelphia's physicians, he came in his old age for that relief from suffering which was so fortunately attained; and here, at the last, he came again when unhappily relief was beyond human skill, and on July 6, 1835, ended his long and honored life.

On the day following his death a meeting of the citizens was held, at which the venerable Bishop White, then in his eighty-eighth year, presided, and a meeting of the Bar appointed a committee, composed of some of its most eminent members, Judge Baldwin, John Sergeant, Richard Peters, Jr., William Rawle, the younger, and Edward D. Ingraham, who accompanied the remains to their final resting place at Richmond.

The Mayor and city officials escorted the body as far as New Castle, and as if to give the last connection with Philadelphia a final touch of pathetic sentiment the venerated bell that had proclaimed liberty throughout the land unto all the inhabitants thereof tolled its last peal at his funeral.

On the invitation of the city councils, Horace Binney, a few months later, delivered that admirable eulogium to which nothing since written has made any substantial addition. No tribute of affection and veneration was wanting that Philadelphia could pay, and that it might not be merely transitory the Bar subscribed a fund for a memorial which, after years of careful nursing and investment, resulted in the noble statue by Story, the lawyer-artist son of Marshall's admiring colleague, erected at the National Capital in our own day, with a memorable oration from one of our own Bar, the late William Henry Rawle.

By the uniform concurrence alike of cotemporaries and posterity, we unhesitatingly claim for Marshall the foremost place in the list of eminent judges. Pinkney said, "He was born to be the Chief Justice of any country into which Provi-

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dence should have cast him." The Bar of Charleston, never converts to his view of the Constitution, yet paid this tribute to the man in a resolution passed on hearing of his death: "Though his authority as Chief Justice of the United States was protracted far beyond the ordinary term of public life, no man dared to covet his place, or express a wish to see it filled by another. Even the spirit of party respected the unsullied purity of the judge, and the fame of the Chief Justice has justified the wisdom of the Constitution, and reconciled the jealousy of freedom to the independence of the judiciary." This tribute, specially eloquent from its source, is believed to have been drawn by the pen of the learned and patriotic Petigru, the bold and eminent figure who in his venerable age attested his fidelity to the principles of Marshall through all the terrible years of civil war by standing out alone and unyielding against the heresy of secession.

And more recently the keenest and best informed of transatlantic critics of American institutions has justly written:

"Another fact which makes the function of an American judge so momentous is the brevity, the laudable brevity, of the Constitution. The words of that instrument are general, laying down a few large principles. The cases which will arise as to the construction of these general words cannot be foreseen till they arise. When they do arise the generality of the words leaves open to the interpreting judges a far wider field than is afforded by ordinary statutes, which, since they treat of one particular subject, contain enactments comparatively minute and precise. Hence, although the duty of a court is only to interpret, the considerations affecting interpretation are more numerous than in the case of ordinary statutes, more delicate, larger in their reach and scope. They sometimes need the exercise not merely of legal acumen and judicial fairness, but of a comprehension of the nature and methods of government which one does not demand from the European judge who walks in the narrow path traced for him by ordinary statutes. It is therefore hardly an exagger-

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ation to say that the American Constitution as it now stands, with the mass of fringing decisions which explain it, is a far more complete and finished instrument than it was when it came fire-new from the hands of the convention. It is not merely their work, but the work of the judges, and most of all of one man, the great Chief Justice Marshall." (Bryce's Am. Commonwealth.)

If we challenge the array of names in that country whose system has produced the historic exemplars of judicial greatness, where shall we find quite his equal? Not in Coke, prodigy of learning and relentless logic and courageous asserter of judicial independence as he was, for he was narrow and technical in his law, illiberal and even vindictive in his personality. Let me not be misunderstood. I speak as a devoted and reverent disciple of the common law and of Coke as a master in it. But it is given to few men to be larger minded than their age, and it is no disparagement to Coke to say that he was not one of the few. Nor shall we find him in Ellesmere or Nottingham or Hardwicke, fathers of equity as they were, nor even in Mansfield, the first great master of technicalities, who yet saw through them all that the true vitality of the common law was its adaptability to the changing affairs of men. Great as these were, and they are the honored of the legal profession wherever their language is known, yet viewing the magnitude, breadth, variety and importance of his labors, or the ability with which he performed them, Marshall has had no equal, hardly a second.

The world's great man who helps to mold its history, is he who, with great abilities, has great opportunities, and by his use of them produces great results. Tried by this exacting standard, in the light of his work as time has proved it, Marshall is the foremost in all the long line of judicial eminence.

A century and a decade have passed since the Constitution of the United States was adopted. Dynasties have risen and fallen; boundaries have expanded and shrunken till

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continents seemed almost the playthings of ambition and war; nationalities have been asserted and subdued; governments built up only to be overthrown, and the kingdoms of the earth from the Pillars of Hercules to the Yellow Sea have been shaken to their foundations. Through all this change and destruction, the Republic, shortest lived of all forms of government in the prior history of the world, surviving the perils of foreign and domestic war, has endured and flourished. The band of union framed to hold together thirteen small communities fringing the Atlantic coast has expanded to unite forty-five states into a mighty nation of more than twenty times the population, spread from ocean to ocean over the breadth of the continent. That it has done this and is still adequate, is due more than to any other one man to the great Chief Justice who defined its terms in such broad and wise and far-seeing and enduring form.

Fortes ante Agamemnona, said the Roman poet. There were great men before Agamemnon, there were just men before Aristides. But even as the Greeks cherished the name of Aristides the just, and sent it down to the admiring centuries, so shall Americans cherish and send down to all time the name of John Marshall as the greatest of jurists. More fortunate than Aristides, no envious countryman was tired of hearing his praise while he lived, he shall be more fortunate in his fame as not only the just man but the just judge.

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The celebration in Philadelphia was honored by the presence of a number of lineal descendants of Chief Justice Marshall, those accepting the invitation being

MRS. J. HARRY CHESLEY, of Claymont, Delaware.
MISS MADGE MARSHALL CHESLEY, " "
MISS CLAUDIA DARE CHESLEY, " "
MISS BESSIE HALL CHESLEY, " "
MISS ETTA HARRY CHESLEY, " "
MRS. ROBERT WRIGHT FORSYTH, of Philadelphia.
MISS CHARLOTTE ELIZABETH FORSYTH, "
MASTER ROBERT WRIGHT FORSYTH, JR., "
MASTER THOMAS MARSHALL FORSYTH, "
MASTER AUGUSTINE WARNER LEWIS FORSYTH, "

Mrs. Chesley and Mrs. Forsyth are grand-daughters of Thomas Marshall, the eldest son of Chief Justice Marshall, and the Misses Chesley, Miss Forsyth and Masters Forsyth are the great grandchildren of Thomas Marshall and the great great-grandchildren of the Chief Justice.

An interesting feature of the John Marshall celebration was the exhibition in charge of the Legal Biography Committee of the Pennsylvania Bar Association, at its gallery and museum in the University of Pennsylvania Law Building.

This consisted of a collection of valuable portraits of the great Chief Justice and his associates on the Bench; loan exhibitions of the Law Association of Philadelphia, of Hampton L. Carson, Charles Roberts and Alfred Percival Smith, Esqs.; and the exhibit of the venerable Law Academy of Philadelphia.

Of all the organizations which united to honor the memory of Marshall, the Law Academy was the only one which existed as an active living body at the time Marshall received his appointment. The distinguished founder and patron of the Academy, Peter S. Du Ponceau, presided at the meeting of the Philadelphia Bar on the death of Marshall. Among the manuscripts was an autograph letter of

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his, accepting a re-election as Provost of the Academy; a minute book referring to the Constitution and By-Laws adopted in 1783; the original copy of those adopted in 1806; printed copies of the numerous addresses prepared especially for the Law Academy from Du Ponceau's time to the present, and numerous other interesting manuscripts.

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